Supreme Court, U.S.
FILED
AUG 28 1992
OFFICE OF THE CLERK

(2)

No. 92-208

In The

Supreme Court of the United States

October Term, 1992

NASAR SIMAAN,

Petitioner,

vs.

TEXACO REFINING AND MARKETING INC.,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

TIMM A. MILLER, Counsel of Record
STEVEN E. KNOTT
10 Universal City Plaza, 13th Floor
Universal City, California 91608
(818) 505-3033

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether an action with respect to the termination of a petroleum franchise under the Petroleum marketing Practices Act ("PMPA") was properly heard in the U. S. District Court when the PMPA provides expressly that the U. S. District Courts have original jurisdiction over PMPA actions and when Petitioner never moved to remand the action to the state court?

B. Whether a challenge to the termination of a petroleum franchise under the PMPA is barred under the one-year limitations period of the PMPA when the franchisee files his action more than one year after the express date of termination of the franchise as set forth in a notice of termination and more than one year after the franchiser ceases to deliver motor fuel pursuant to said notice of termination?

C. Whether the PMPA's express preemption of all state law not the "same as" the PMPA preempts California State law claims for damages due to the termination of a motor fuels franchise when the PMPA's one-year statute of limitations bars such a challenge?

D. Whether the District Court erred in granting judgment on Texaco's counterclaim for unlawful detainer of real property held by Petitioner pursuant to a month to month tenancy after franchise termination, where Petitioner received notice in writing that such tenancy was terminated more than one month before Texaco filed its action?

LIST OF PARTIES

All parties to the proceeding in the court whose judgment Petitioner seeks to review appear on the caption set forth on the cover of this brief. Further, in accordance with Supreme Court Rule 29.1, Texaco Refining and Marketing Inc.'s parent company is Texaco Inc., and the only manner in which a person can acquire an ownership interest in any subsidiaries of Texaco Inc. is by purchasing the publicly traded shares of Texaco Inc.

TABLE OF CONTENTS

Page

Table of Contents iii

Table of Authorities v

Table of Statutes and Other Authorities v

Statement of Jurisdiction 1

Restatement of the Case 1

–Nature of the Case 1

–Course of Proceedings and Disposition of Case by Ninth Circuit 2

–Restatement of Facts 3

Summary of Respondent's Argument 4

Argument 7

A. Removal of Petitioner's Action to The District Court Is Proper Where All of The Claims Arise Under the PMPA, Which Provides Expressly That The District Courts Have Original Jurisdiction Over PMPA Actions, Petitioner Did Not Move to Remand, and Petitioner Did Not Present the Issue to the Ninth Circuit 7

B. The Statute of Limitations Bars Petitioner's First Cause of Action For Wrongful Termination Under the PMPA Because More Than One Year Elapsed Between The Termination Date And The Date Petitioner Filed Suit 8

1. The statute of limitations began to run on June 12, 1984, when Petitioner's franchise was terminated 8

TABLE OF CONTENTS – Continued

Page

2. Petitioner's complaint was filed on July 23, 1985 – more than one year after termination of Petitioner's franchise 11

C. The PMPA Preempts Petitioner's Second Cause of Action Because The State Remedy Asserted Therein Is Not The Same As The PMPA 13

1. The PMPA preempts state law remedies for franchise termination that are not the same as the remedies provided under the PMPA..... 13

2. Petitioner's state remedy asserted in the second cause of action is not the same as the PMPA 14

D. The Trial Court Properly Dismissed Petitioner's Third Cause of Action Because That Cause Of Action, For Texaco's Decision Not To Agree To The Franchise Sale, Is Preempted By The PMPA..... 15

E. Texaco's Motion For Summary Judgment On The Second Cause Of Action Of Texaco's Counterclaim Was Properly Granted Because Petitioner Was On A Month To Month Tenancy That Was Terminated In A Timely Manner By Texaco 17

Conclusion 18

TABLE OF AUTHORITIES

Page

Cases

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 12

Continental Enterprises v. Am. Oil Co., 808 F.2d 24 (8th Cir. 1986) 14

Iannuzzi v. Exxon Co. U.S.A. Div. of Exxon, 572 F. Supp. 716 (D. N.J. 1983) 10, 11

In re Herbert, 806 F.2d 889 (9th Cir. 1986) 13

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 15

Humboldt Oil Co., Inc. v. Exxon Co. U.S.A., 823 F.2d 373 (9th Cir. 1987) 15, 16

Mastelotto v. Exxon Co., U.S.A., 485 U.S. 1021 (1988) 15

Medlin v. Boeing Vertol Co., 620 F.2d 957 (3d Cir. 1980) 8

Pride v. Exxon, 911 F.2d 251 (9th Cir. 1990) 9

Statutes and Other Authorities

Petroleum Marketing Practices Act

15 U.S.C. § 2801 *et seq.* ..... *passim*

15 U.S.C. § 2801(1)(A) 9, 12

15 U.S.C. § 2801(1)(A)(ii) 11

15 U.S.C. § 2805(a) 1, 7

15 U.S.C. § 2805(a)(1) 9

15 U.S.C. § 2806(a) 13

TABLE OF AUTHORITIES – Continued

Page

15 U.S.C. § 2805(b)(2)(A)(i) 11

28 U.S.C. § 1254 1

28 U.S.C. § 1291 1

28 U.S.C. § 1332 1

28 U.S.C. § 1441(a) 7

28 U.S.C. § 1446(e) 1

Cal. Civ. Proc. Code § 1161 17

Cal. Civ. Code § 1943 17

Cal. Civ. Code § 1946 17

LEGISLATIVE MATERIALS

S. Rep. No. 731, 95th Cong., 2d Sess. 19, *Reprinted in* 1978 U.S. Cong. & Admin. News 873, 874, 901 16

I.

STATEMENT OF JURISDICTION

This case was removed to the United States District Court on August 7, 1987, under 28 U.S.C. Section 1446(e), based on federal question jurisdiction under 15 U.S.C. Section 2805(a) of the PMPA and based on diversity of citizenship under 28 U.S.C. Section 1332. The United States Court of Appeals had appellate jurisdiction under 28 U.S.C. Section 1291. This Court has jurisdiction to review this matter under 28 U.S.C. Section 1254.

II.

RESTATEMENT OF THE CASE

Nature of the Case

Petitioner, a service station operator, was a franchisee under a written contract for the delivery of motor fuels. Petitioner's lease provided that Petitioner would not rent trucks from the premises, but he did anyway. Texaco terminated Petitioner's franchise by written notice on March 24, 1984.

Petitioner's first amended complaint contains three causes of action against Texaco. The first cause of action alleged that the termination of Petitioner's franchise was in violation of the PMPA. Petitioner's second cause of action alleged that Texaco's refusal to continue sales of Texaco trademark products after the franchise termination was in violation of California Business and Professions Code Section 21140.4. Petitioner's third cause of action alleged that, after Texaco notified Petitioner of the franchise termination, Texaco wrongfully declined to

approve or disapprove an alleged sale by Petitioner of the franchise. Petitioner alleged that he was thus entitled to exemplary and compensatory damages, and that Texaco's breach of contract amounted to a breach of the implied covenant of good faith and fair dealing.

Also at issue is Texaco's counterclaim. The second claim of Texaco's counterclaim was for Petitioner's wrongful detention of the premises after Texaco's express termination of Petitioner's holdover tenancy.

Course of Proceedings and Disposition of Case By the Ninth Circuit

Petitioner filed his complaint on July 23, 1985, in the Superior Court of California for the County of Orange. Petitioner's first amended complaint was served on Texaco on December 23, 1985. On August 7, 1987, Texaco removed the case to the United States District Court for the Central District of California. On August 12, 1987, Texaco filed its answer to Petitioner's first amended complaint and also filed a counterclaim.

On February 12, 1988, Texaco filed a motion for summary judgment on Petitioner's first cause of action. The District Court heard the motion on March 14, 1988. On March 25, 1988, the District Court ordered that Texaco's motion for summary judgment on Petitioner's first cause of action be granted.

On May 25, 1988, Texaco filed a motion for summary judgment on Petitioner's second and third causes of action and further moved for summary judgment on the second case of action in Texaco's counterclaim for unlawful detainer. On July 27, 1988, the District Court entered

findings of fact and conclusions of law on Texaco's motion of May 25, 1988, and granted summary judgment for Texaco on Petitioner's second and third causes of action. The District Court also granted interlocutory summary judgment in favor of Texaco as to all liability issues on Texaco's counterclaim for unlawful detainer. In addition, the District Court ordered that a writ of a possession be issued forthwith restoring the premises to Texaco. The judgment narrowed the issues for trial to the amount of Texaco's damages for Petitioner's unlawful detainer of the premises.

On September 26, 1989, the matter came on regularly for trial. On August 17, 1990, Texaco filed its proposed findings of fact and conclusions of law. On August 21, 1990, the District Court entered its decision awarding Texaco the sum of $68,322.14 and costs of the action.

Petitioner filed his Notice of Appeal to the United States Court of Appeals for the Ninth Circuit on September 2, 1990. Counsel for both parties argued and submitted the matter on March 6, 1992. The Court of Appeals affirmed the ruling of the District Court in all respects on March 20, 1992. The panel voted unanimously to deny appellant's petition for rehearing on May 11, 1992.

Restatement of Facts

In January, 1983, Texaco leased the premises that is the subject of the case at bar to Petitioner. Also in January, 1983, Texaco entered into an Agreement of Sale that provided for the sale by Texaco of its trademark brand motor fuels to Petitioner for delivery at the premises.

On March 12, 1984, Texaco gave Petitioner written notice that his retailer franchise was terminated. The letter set forth June 12, 1984, as the effective date for termination. After Texaco gave Petitioner the termination notice, Petitioner sent a letter dated March 21, 1984, wherein Petitioner requested Texaco's position with respect to Petitioner's alleged desire to sell his franchise.

Texaco made no motor fuel sales to Petitioner after June 12, 1984. Moreover, Petitioner admitted below that he had no agreement with Texaco authorizing or permitting him to use Texaco's trademark in connection with the sale of motor fuels after June 12, 1984.

Following termination of the franchise on June 12, 1984, Petitioner occupied the premises on a month to month tenancy. On July 24, 1984, Texaco sent Petitioner a notice of termination of the month to month tenancy effective August 31, 1984. Despite the cancellation of Petitioner's month to month tenancy, Petitioner refused to vacate the premises and remained until June 30, 1988. Asserting, among other things, that Texaco's termination of Petitioner's franchise violated the PMPA, Petitioner filed this action on July 23, 1985, in the Orange County Superior Court.

III.

SUMMARY OF RESPONDENT'S ARGUMENT

Texaco did not address below and will not discuss here Petitioner's argument concerning the propriety of the franchise termination of June 12, 1984. Although Texaco believes that the termination was entirely proper

under the PMPA, Petitioner's failure to challenge the termination within one year renders any discussion of Petitioner's U-Haul operations irrelevant. Furthermore, we note that Petitioner's statement of facts is based upon, in several instances, proposed opposition findings of fact filed by his attorney in connection with his opposition to summary judgment motions. We ask that this Court treat such paper, which is not evidence and which was rejected by the District Court and the Ninth Circuit, as wholly insufficient to establish any material issue of triable fact. Specifically, paragraphs two through sixteen in Petitioner's statement of facts on appeal to the Ninth Circuit and pages four through five in Petitioner's statement of facts in his petition for certiorari rely in whole and occasionally in part on C.R. 16 and on C.R. 31, both of which were Petitioner's responses to Texaco's proposed statements of fact and conclusions of law and were signed only by Petitioner's attorney.

The relevant inquiry in this case begins with Texaco's letter to Petitioner dated March 12, 1984. On that day, Texaco told Petitioner that, pursuant to the PMPA, Texaco was terminating Petitioner's franchise effective June 12, 1984.

Petitioner responded, after the notice, by requesting through his attorney that Texaco advise Petitioner as to Texaco's opinion regarding any possible sale of the franchise by Petitioner. Texaco did not and was not required to respond to the inquiry because Petitioner made the inquiry *after* the notice of termination. The Ninth Circuit has stated, and Petitioner cannot reveal any conflicting holdings in the circuits, that a franchisee may not avoid the consequences of his conduct that led to the notice of

termination by simply assigning or selling his interest in the premises after such notification. Accordingly, since the PMPA preempts all state law not the "same as" the PMPA, Petitioner cannot seek a state remedy for Texaco's failure to respond to the inquiry when the PMPA bars any remedy whatsoever.

As of June 12, 1984, Texaco halted its delivery of motor fuels to the premises occupied by Petitioner. Texaco thereafter had neither agreement nor obligation to sell Texaco branded motor fuel to Petitioner after June 12, 1984, the effective date of Petitioner's termination. Hence, as of June 12, 1984, Petitioner no longer had a franchise agreement with Texaco.

Although the franchise relationship between Texaco and Petitioner was over, Texaco received rent money from Petitioner in July, 1984, and thus created a month to month lease for the land pursuant to paragraphs eight and eleven of the lease and the letter from Texaco dated July 24, 1984, that acknowledged the holdover tenancy. No agreements existed between Texaco and Petitioner, however, regarding the sale of Texaco motor fuel to Petitioner after June 12, 1984.

The month to month tenancy was terminated by Texaco as of August 31, 1984, pursuant to a lease termination letter from the Texaco real estate department (the notice of termination dated March 14, 1984, of Petitioner's franchise was handled by Texaco's marketing department). Petitioner refused to leave the premises pursuant to Texaco's notice and thus his detention of the premises became wrongful as of September 1, 1984.

On July 23, 1985, Petitioner filed a civil action in the Superior Court of California to challenge Texaco's termination of his franchise. Petitioner thus filed his action more than one year *after* June 12, 1984. Petitioner's challenge to the termination is thus barred by the PMPA's one-year statute of limitations.

Petitioner finally left the premises on June 30, 1988. After trial in the district court, Texaco was awarded damages based on evidence of the fair market rental value of the premises for the period of the unlawful detainer by Petitioner less the month to month partial payments by Petitioner during the same period.

IV.

ARGUMENT

A. Removal of Petitioner's Action to The District Court Is Proper Where All of The Claims Arise Under the PMPA, Which Provides Expressly That The District Courts Have Original Jurisdiction Over PMPA Actions, Petitioner Did Not Move to Remand, and Petitioner Did Not Present the Issue to the Ninth Circuit.

Petitioner cannot challenge Texaco's removal of this action to the district court because any case wherein the federal district courts have original jurisdiction may be removed to the district court of the United States. 28 U.S.C. § 1441(a). The district courts of the United States have original jurisdiction over PMPA actions. 15 U.S.C. § 2805(a). Hence, complete preemption by the PMPA is not the issue before this Court because the district court

had subject matter jurisdiction and original jurisdiction and thus may hear the case.

Petitioner never challenged the removal by moving to remand. Indeed, Petitioner complains of the removal for the first time in his petition for certiorari. Because Petitioner never moved to remand the action, he has waived any challenge to the removal. *See Medlin v. Boeing Vertol Co.*, 620 F.2d 957, 960 (3d Cir. 1980) (after unchallenged removal and case heard on merits, the court cannot remand for procedural irregularity, but can remand if subject matter jurisdiction absent).

In the case at bar, the district court had subject matter jurisdiction conferred expressly by the PMPA, Texaco removed the state court action filed by Petitioner, Petitioner did not move to remand the action to the state court, and after extensive litigation, judgment was entered. Petitioner now complains that he would like to try again in state court. Petitioner offers no reason, either in law or in equity, why this Court should hear such a petition.

B. The Statute of Limitations Bars Petitioner's First Cause Of Action For Wrongful Termination Under The PMPA Because More Than One Year Elapsed Between The Termination Date And The Date Petitioner Filed Suit.

1. The statute of limitations began to run on June 12, 1984, when Petitioner's franchise was terminated.

The one-year statute of limitations in the PMPA starts running on the date a petroleum franchise agreement is

terminated. 15 U.S.C. § 2805(a)(1). On these facts, the clock started running on June 12, 1984, for on that date Petitioner's franchise was terminated as set forth in Texaco's notice of termination to Petitioner of March 12, 1984. As of June 12, 1984, Petitioner himself knew that his franchise was terminated because Texaco would not sell him motor fuels after that date.

Petitioner attempts to avoid the clear bar of the one-year limitations period by asserting that his holdover tenancy is a franchise under the PMPA. Petitioner's argument must be rejected because Petitioner's month to month lease after June 12, 1984, was not a franchise under the PMPA.

To show a franchise under the PMPA, a Petitioner must prove an express agreement whereby a refiner (Texaco) authorizes a retailer (Petitioner) to use the refiner's trademark in connection with the sale of motor fuels. 15 U.S.C. § 2801(1)(A). *Pride v. Exxon*, 911 F.2d 251, 254 (9th Cir. 1990) (sales do not create a PMPA franchise when the sales are not of trademark "branded" motor fuels). On June 12, 1984, Petitioner's supply of motor fuels from Texaco ceased and the agreement with Texaco was terminated.

Petitioner's attempt to imply that a holdover lease of land resuscitates a deed franchise is wholly without support. In short, Petitioner fails to recognize that a lease for land is not the same as a sales agreement that authorizes the use of a trademark to sell motor fuels. Petitioner cannot imply from the holdover land lease a new creature called a holdover franchise, for a franchise agreement to use a trademark in the sale of motor fuels cannot be

implied. *Iannuzzi v. Exxon Co., U.S.A., Div. of Exxon*, 572 F. Supp. 716, 723-25 (D. N.J. 1983).

In *Iannuzzi*, an Exxon franchisee, Mr. Iannuzzi, entered into a sales agreement with Exxon in 1976. Mrs. Iannuzzi, however, did not sign the sales agreement. In 1978, the PMPA was enacted and applied retroactively. Mr. Iannuzzi died in 1980. Mrs. Iannuzzi continued to receive motor fuel deliveries from Exxon. Exxon asserted that the continued deliveries were not due to the sales agreement, but rather that they were due to federal Department of Energy allocation requirements. In 1981, the President exempted motor fuels from the allocation requirements. Shortly thereafter, Exxon notified Mrs. Iannuzzi that Exxon would terminate the franchise effective two weeks after the notice. Exxon asserted that the termination was due to the death of the person with whom Exxon had made the contract – Mr. Iannuzzi. Mrs. Iannuzzi thereupon argued that Exxon's delivery of motor fuels after her husband's death was a course of conduct creating an implied franchise relationship between Exxon and her.

The Court rejected Mrs. Iannuzzi's argument. The Court held that "[T]he PMPA clearly and unambiguously provides that contracts be either written or oral; it does not include 'implied contracts.' " 572 F. Supp. at 724.

Similarly, Petitioner in the instant case cannot imply a PMPA franchise merely because he occupied the premises under a month to month ground lease. In *Iannuzzi*, the plaintiff was actually receiving motor fuels from Exxon. The Court nonetheless found that a franchise could not be implied.

On our facts, not only did Texaco give notice that Petitioner's franchise was terminated effective June 12, 1984, Texaco also refused to sell one drop of motor fuel to Petitioner after June 12, 1984. In the case at bar, there were simply no sales between Texaco and Petitioner after the effective date of termination. Thus, there is less of a basis to "imply" a PMPA franchise than suggested in the facts at issue in *Iannuzzi*. Moreover, Texaco's letter acknowledging the holdover tenancy to Petitioner stated expressly that the holdover tenancy did not extend the sales agreement that had been terminated by Texaco's notice of termination.

Even if Petitioner purchased Texaco trademark motor fuel from some party other than Texaco after June 12, 1984, his agreement with Texaco itself was terminated. One must focus on the agreement to which Petitioner and Texaco are the parties because that is the agreement to which Texaco's notice of termination addressed itself. Petitioner challenged Texaco's termination of the sales agreement he had with Texaco, which agreement was a franchise under 15 U.S.C. § 2801(1)(A)(ii). Any other agreement is irrelevant whether it creates a franchise with some other party or not.

2. Petitioner's complaint was filed on July 23, 1985 – more than one year after termination of Petitioner's franchise.

Petitioner's Complaint was filed on July 23, 1985. In a PMPA action, the dealer must carry the burden of showing the existence of a franchise. 15 U.S.C. § 2805(b)(2)(A)(i). To deem Petitioner's action timely,

therefore, Petitioner has the burden of proving a franchise relationship through July 23, 1984. Petitioner failed completely to meet his burden of showing the existence of a franchise and thus Petitioner could not meet his burden as set forth under *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Under *Celotex*, when a defendant properly asserts that a plaintiff has no evidence to create a genuine issue of material fact, and plaintiff fails to produce competent evidence at a summary judgment hearing to create a genuine issue of material fact, then the District Court must grant the defendant's motion for summary judgment. 477 U.S. at 323.

In this case, Texaco properly raised the issue of whether Petitioner had a franchise with Texaco under the PMPA more than one year before Petitioner filed this action. Petitioner thus had the burden to produce evidence showing that through July 23, 1984, Petitioner had an express agreement *with Texaco* authorizing Petitioner to use Texaco trademarks in the sale of motor fuels pursuant to the definitions of a PMPA "franchise" under 15 U.S.C. § 2801(1)(A). Without such an agreement, Petitioner had no franchise with Texaco within one year of filing his complaint and his action was thus not timely. The date of filing suit on the termination and the effective date of the franchise termination are clear and are more than one year apart. The District Court thus correctly concluded that Petitioner's First Cause of Action was time-barred under the PMPA.

C. The PMPA Preempts Petitioner's Second Cause of Action Because The State Remedy Asserted Therein Is Not The Same As The PMPA.

1. The PMPA preempts state law remedies for franchise termination that are not the same as the remedies provided under the PMPA.

The PMPA preempts state law remedies for franchise termination that are not the same as the remedies under the PMPA. 15 U.S.C. § 2806(a). Section 2806(a) provides in relevant part:

> 2806 (a) To the extent that any provision of this subchapter applies to the termination . . . of any franchise . . . , no State or any political subdivision may adopt, enforce, or continue in effect any law or regulation (including any remedy or any penalty applicable to any violation thereof) with respect to termination of any such franchise relationship unless such provision of such law or regulation is the same as the applicable provision of this subchapter.

This Ninth Circuit has clearly held that "[t]he language in section 2806(a) makes clear the PMPA *was intended to preempt all state law* with respect to termination of a petroleum franchise." *In re Herbert*, 806 F.2d 889, 892 (9th Cir. 1986) (emphasis in original). No conflict is present in the Circuit Courts of Appeal on this issue.

To dodge the explicit preemption mandate of the PMPA concerning termination, Petitioner argues that his second cause of action for failure to deliver motor fuels is "separate and distinct from the issue of termination of the franchise" (Petition for Certiorari, p. 16). Such reasoning would render the preemption language of the PMPA

nugatory and thus cannot stand. Whenever an agreement to sell motor fuels is terminated there is a concomitant termination of the sales themselves. Petitioner's attempt to construe the termination of the franchise as a severable issue from that which necessarily attends the termination is merely a refusal to acknowledge the obvious in the hopes that the logically apparent will go unnoticed. *See Continental Enterprises v. Am. Oil Co.*, 808 F.2d 24, 27 (8th Cir. 1986) (state law claim for breach of contract for non-renewal of service station lease against oil company barred by PMPA statute of limitations because PMPA preempts a state law action when the action arises out of the franchise or is an incident of the termination).

Altogether, Petitioner's second cause of action is a claim for damages resulting from the termination of a petroleum franchise and is therefore within the PMPA. Petitioner's ostrich-like denial of the PMPA's application to the second cause of action is without merit.

2. Petitioner's state remedy asserted in the second cause of action is not the same as the PMPA.

As discussed above, Petitioner seeks damages because Texaco refused to sell motor fuels to him after the termination date of June 12, 1984. The second cause of action is in substance a claim for damages flowing from the franchise termination.

Under these circumstances, to allow Petitioner to proceed on a state claim for damages for non-delivery of gasoline after the franchise termination date would permit a remedy for the franchise termination when, under

the PMPA, remedies are barred. Thus, the state remedy (some remedy) would not be the same as the PMPA (no remedy) and is preempted, for it is well established that if Congress puts a limit upon the time for enforcing a right that it created, there is an end of the matter. The Congressional statute of limitations is definitive. *Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946).

D. The Trial Court Properly Dismissed Petitioner's Third Cause Of Action Because That Cause Of Action, For Texaco's Decision Not To Agree To The Franchise Sale, Is Preempted By The PMPA.

The PMPA preempts a claim against the franchisor for failure to agree to a franchise assignment where the assignment is requested after the sending of a termination notice by the franchisor (in this action, Texaco). *See Humboldt Oil Co., Inc. v. Exxon Co., U.S.A.*, 823 F.2d 373, 375 (9th Cir. 1987), *cert. denied* by *Mastelotto v. Exxon Co. U.S.A.*, 485 U.S. 1021 (1988). In *Humboldt*, Exxon terminated a dealer for selling mislabeled fuel. The dealer then wanted to assign his franchise to a third person, but Exxon refused to consent to that transfer. In the lawsuit over the termination, the dealer included a claim under California law based on Exxon's refusal to allow the assignment. The jury awarded the dealer a verdict for $750,000 on the state law refusal to allow the assignment claim.

The Ninth Circuit relied on the legislative history of the PMPA in reversing the award on preemption

grounds. The court noted that while the PMPA left the subject of franchise assignment to state regulation,

> " . . . the legislative history indicates that Congress anticipated potential conflict between federal termination and state assignment provisions and suggested a method of reconciliation:
>
> > 'For example, it is not intended that a franchisee may avoid the consequences of his own conduct which gave arise to a Notice of Termination or Non-renewal by merely assigning his franchise after having been notified by the franchisor of the franchisor's intent to terminate or fail to renew. Such a result would not be countenanced under general principals of equity.' [S. Rep. No. 731, 95th Cong., 2d Sess. 19, *Reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 901.] To the extent that the applications of state law frustrate federal objectives, they are preempted." 823 F.2d at 375.

Thus, allowing a state law remedy for not permitting a franchise assignment would frustrate the franchisor's right to end the relationship with the dealer. A state law remedy against the franchisor for not consenting to a franchise assignment after a Franchise Termination Notice has been sent.

> " . . . clearly is an obstacle to accomplishment of Congress' undisputed interest in a national, uniform policy for petroleum franchise termination. Therefore, we conclude that in this situation the PMPA preempts California law." 823 F.2d at 375.

Petitioner has not revealed that the above holding is in conflict with other Circuit Courts of Appeal.

E. Texaco's Motion For Summary Judgment On The Second Cause Of Action Of Texaco's Counterclaim Was Properly Granted Because Petitioner Was On A Month To Month Tenancy That Was Terminated In A Timely Manner By Texaco.

Petitioner admitted in paragraph fourteen of his Answer to Texaco's counterclaim that he occupied the premises after the June 12, 1984, termination date. As such, the tenancy is presumed to be a month to month tenancy. *Cal. Civ. Code* § 1943. Accordingly, Petitioner's Tenancy was terminable on thirty days written notice. *Cal. Civ. Code* § 1946.

Shortly after June 12, 1984, Texaco sent Petitioner a letter that canceled the month to month tenancy at the premises effective August 31, 1984. Under these circumstances, Petitioner's continued occupancy of the premises after August 31, 1984, was unlawful commencing September 1, 1988. *Cal. Civ. Proc. Code* § 1161.

In response to the above contentions, Petitioner asserts that the Courts below committed error because their rulings flowed from "an implied finding" that Texaco validly terminated Petitioner's franchise. (Petition for Certiorari, p. 17). Again, Petitioner fails to acknowledge that the dispositive issue here, as it was below, focuses on the statute of limitations. Specifically, the focus is that Petitioner failed to file his PMPA action until more than one year after the effective date of termination, and an integral part of that termination was the termination of the marketing premises under the franchise.

V.

CONCLUSION

Petitioner failed to bring this action to challenge the termination of his franchise within the one-year PMPA statute of limitations. Also, Petitioner's attempt to avoid the PMPA statute of limitations by pleading state law causes of action fails. The state law causes of action are preempted because they relate to the termination of a petroleum franchise and are not the same as the PMPA. Thus, Petitioner presents nothing to warrant a grant of certiorari, and the Court should thus deny the petition.

DATED: August 28, 1992

Respectfully submitted,

TIMM A. MILLER
Counsel of Record
Attorneys for Respondent
TIMM A. MILLER,
STEVEN E. KNOTT

10 Universal City Plaza
13th Floor
Universal City, California 91608
Telephone: (818) 505-3033